

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
1998 Biennial Regulatory Review --) MM Docket No. 98-43
Streamlining of Mass Media Applications,)
Rules, and Processes)

To: The Commission

Petition for Reconsideration

Sungilt Corporation, Inc. ("Sungilt"), permittee of Television Broadcast Station KXGR(TV), Channel 46, Green Valley, Arizona, by its attorneys and pursuant to Section 1.106 of the Commission's Rules, hereby petitions the Commission to reconsider and/or clarify those portions of the Report and Order adopted on October 22, 1998, in the above-captioned proceeding (the "Report and Order"), that, without providing affected parties with appropriate notice and opportunity to comment, appears to substantively amended the Commission's Rules so as to severely limit the ability of entities, including Sungilt, that hold construction permits that are beyond their initial construction period to extend the expiration of such construction permits.

I. FACTUAL BACKGROUND

Sungilt's construction permit, File Number BMPCT-960801LM, modifying Permit No. 951030KI, was granted on October 25, 1996, and expired on April 25, 1997. A copy of Sungilt's construction permit is attached hereto as Exhibit 1. Sungilt filed a timely application for an extension of its construction permit in which it demonstrated that it had: (1) made substantial progress on the facilities authorized by its construction permit, and (2) been unable to complete construction due to unseasonable snowstorms which precluded it from accessing the transmitter site

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for virtually the entire construction permit period -- a reason clearly beyond Sungilt's control. Accordingly, Sungilt's extension application met two of the three criteria enumerated by Section 73.3534 of the Commission's Rules as a basis for grant of an extension of a construction permit, even though Section 73.3534 only requires one of its three criteria to be met. A copy of Sungilt's April 24, 1997 Application for Extension of its Construction Permit is attached hereto as Exhibit 2. Nonetheless, by letter ruling dated November 28, 1997, the Commission denied Sungilt's request for an extension of its construction permit. A copy of the Letter Ruling of the Chief, Video Services Division, Mass Media Bureau, dated November 28, 1997 is attached hereto as Exhibit 3. On December 29, 1997, Sungilt filed a timely Petition for Reconsideration of the Bureau's denial of an extension of its construction permit, arguing that the third part of the "one-in-three" test enumerated in Section 73.3534 was clearly satisfied, because, during virtually the entire construction permit period, adverse weather conditions precluded construction at the proposed KXGR(TV) transmitter site. A copy of Sungilt's Petition for Reconsideration is attached hereto as Exhibit 4. Sungilt filed a supplement to its Petition for Reconsideration on January 16, 1998, in which it provided the Bureau with further evidence of how adverse weather conditions precluded it from constructing the KXGR(TV) transmitter facilities during the entire construction permit period. A copy of Sungilt's Supplement to its Petition for Reconsideration is attached hereto as Exhibit 5. Sungilt's Petition for Reconsideration is pending before the Bureau.¹

¹ Sungilt believes that it has demonstrated in its Petition for Reconsideration and Supplement that its construction permit should be reinstated. However, Sungilt will not reargue that issue in this Petition. To the extent relevant, Sungilt incorporates by reference its Petition for Reconsideration and Supplement in this Petition. See, Exhibits 4 and 5.

II. THE NOTICE OF PROPOSED RULEMAKING FAILED TO PROVIDE SUNGILT WITH NOTICE THAT THE COMMISSION WOULD SUBSTANTIVELY MODIFY THE STANDARD UNDER WHICH IT WOULD REVIEW SUNGILT'S APPLICATION FOR EXTENSION OF ITS CONSTRUCTION PERMIT

Sungilt refrained from filing comments in the above-captioned proceeding, because the Notice of Proposed Rulemaking issued by the Commission on April 3, 1998 (the "NPRM") appeared to clearly indicate that, because Sungilt's construction permit was beyond its initial period, the proposed rules regarding the extension of construction permits would not apply to Sungilt. Specifically, at paragraph 67 of the NPRM, the Commission stated that:

Finally, we propose that the rules regarding construction permits, and extensions thereof, that we adopt in this rulemaking proceeding be applied to any construction permit that is currently in its initial construction period (*i.e.*, the first 24 months for a full power TV facilities permit and the first 18 months for an AM, FM, International Broadcast, low power TV, TV translator, TV booster, FM translator, FM booster, or broadcast auxiliary permit). We invite comment on how to implement our proposal and whether implementation would cause unjustifiable hardship to permittees or would result in a disservice to the public. We believe, however, that it would be administratively unworkable to apply the proposed rules to construction permits that are already beyond their initial construction periods (whether through extension, assignment, transfer of control, or modification). Because many of these permits have already been afforded a construction period close to (or, in many instances, in excess of) the three-year term proposed in this Notice, we propose to continue to apply the rules as they exist today to permits outside their initial periods. We invite comment on the tentative conclusion that it is more appropriate to continue to apply our current rules to construction permits that are beyond their initial periods.

NPRM at Para. 67 (emphasis added)

Thus, in the NPRM, the Commission clearly expressed its intention to Sungilt, and other entities holding construction permits that were beyond their initial terms, that the proposed rules would not be applicable to their pending construction permits and would not further restrict their ability to seek extensions of their construction permits pursuant to the currently applicable "one-in-

three" showing contained in Section 73.3534 of the Commission's Rules.

However, in its subsequently released Report and Order, the Commission, without notice to Sungilt and other similarly situated permittees, adopted Rules that appear to effectuate a result that is precisely the opposite of what the Commission indicated it intended to do in the NPRM. It appears that, in the Report and Order, by deleting Section 73.3534 of the Commission's Rules in their entirety, the Commission mandated that in all cases, the construction authorized by all construction permits, even permits, such as Sungilt's that had been outstanding for over three years, be completed within three years, unless the permittee can demonstrate that an "act of God" made construction progress impossible notwithstanding the permittee's diligent efforts.

The Report and Order stated, at paragraph 84 that:

Although we proposed in the *Notice* that these rules apply to any construction that is within its initial construction period at the time these rules are adopted, we conclude that the fairer approach is to allow all permittees to take advantage of the extended construction period in the manner set forth below. Act of God encumbrances will be narrowly construed and include only those periods where the permittee demonstrates that the construction progress was impossible, notwithstanding its diligent efforts. In light of these new procedures, we eliminate the current practice of providing additional time for construction after a permit has been modified or assigned.

Sungilt notes that the Commission's precise intent is not clear from a reading of this paragraph. The Commission states, "the fairer approach is to allow all permittees to take advantage of the extended construction period . . ." *Id.* Thus, it would appear that the Commission's purpose in this paragraph was to provide parties with outstanding construction permits with more time. However, as applied to Sungilt and similarly situated permittees, the result will be just the opposite. Thus, pursuant to the Report and Order and contrary to the tentative conclusion in the NPRM, the Commission's current rules will be amended, and, if Sungilt's Petition for Reconsideration that is

pending before the Bureau has not been acted upon by the Bureau before the effective date of the amended rules, it appears that Sungilt's Petition for Reconsideration may be ruled upon under the amended rules.

The amended rules, which are much more restrictive than the current rules, and inconsistent with longstanding Commission practice, could potentially lead to a denial of any reinstatement or extension of Sungilt's construction permit, and deny the Bureau the ability to analyze Sungilt's Petition pursuant to Section 73.3534 of the Commission's Rules, the rule section pursuant to which the Petition was filed. Sungilt received no notice that the Commission was considering such a draconian result. As shown above, the NPRM stated just the opposite – that the Commission contemplated no change in the current rule as it applied to permittees in Sungilt's position. Thus, the NPRM gave Sungilt no notice of the rule which has been adopted and no notice that its Petition would be ruled upon pursuant to this new restrictive rule. To apply the rule to permittees such as Sungilt is a denial of due process, violates the Administrative Procedure Act, 5 U.S.C § 551, et seq., and is fundamentally unfair.

III. THE COMMISSION MAY NOT RETROACTIVELY APPLY THE AMENDED RULES TO PETITIONS PENDING BEFORE THE ADOPTION OF THE AMENDED RULES

The Report and Order provides, contrary to the proposal in the NPRM, that it will apply to all outstanding construction permits. To the extent the rule changes the terms for granting an extension application already on file before the rule was adopted, it amounts to a retroactive rule change, and is inconsistent with longstanding precedent against retroactive rulemaking. See, Landgraf v. USI Film Products, 511 U.S. 244, 265-266 (1994) and Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988). The rule change was adopted by the Commission on November

25, 1998. Sungilt's Form 307 request for an extension of its construction permit was filed on April 24, 1997, and its Petition for Reconsideration of the Commission's denial of its request for an extension of its construction permit was filed on December 29, 1997. Thus, application of the amended rule to Sungilt's pending Petition would be retroactive rulemaking and is impermissible. Sungilt's request for extension of its construction permit, and its Petition for Reconsideration were filed in reliance on the Commission's current rules and practices. Moreover, Sungilt's business plan and substantial expenditures in pursuit of its business plan have been made upon reliance on the Commission's stated construction permit policies. Sungilt may be irreparably injured if the Commission retroactively applies a new standard for action on its pending Petition.

It appears that in the NPRM, the Commission recognized the impropriety of applying the rule retroactively. See, NPRM at Para. 67. Sungilt therefore requests that the Commission clarify that the amended rules will not apply to any requests for extension of time or Petitions for Reconsideration of such pending requests prior to the effective date of the new rules.

IV. THE COMMISSION SHOULD CLARIFY THE RULE ADOPTED IN THE REPORT AND ORDER WITH RESPECT TO TOLLING OF THE CONSTRUCTION PERMIT PERIOD

The Report and Order eliminates Section 73.3534 of the Commission's Rules as it currently stands. Under the current version of Section 73.3534, a permittee can obtain an extension of its construction permit if it can show that "no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction." This showing has been replaced by proposed Section 73.3598(b), which, as explained above tolls the newly-adopted three year limitation only if different, more

restrictive conditions are met. For the reasons more fully specified below, Sungilt respectfully requests that the Commission reconsider the language contained in proposed Section 73.3598(b) of the Commission's Rules and clarify when the three year construction permit limitation will be tolled.

A. The Commission Should Clarify That The Snowcover That Precluded Sungilt from Constructing the Authorized Facilities Was an "Act of God" That Tolls the Three Year Period of Construction Mandated by Proposed Section 73.3598(b)(i) of the Commission's Rules

Proposed Section 73.3598(b)(i) of the Commission's Rules provides that the three year limit for a construction permit can be tolled if "[c]onstruction is prevented due to an act of God, defined in terms of natural disasters (e.g. floods, tornados, hurricanes, or earthquakes). Sungilt respectfully requests that the Commission clarify that conditions such as: snowfalls, freezing temperatures, ice, heavy winds and other harsh, but common, weather conditions are also "acts of God," which will toll the construction permit period, if they in fact make construction impossible. It is not clear from the Report and Order whether an "act of God" for purposes of the tolling provision is intended to apply to "acts of God" which are accompanied by widespread devastation, or whether less devastating, but equally or even more disabling "acts of God" are also included by the Rule.

This distinction is critical to Sungilt's circumstances, because Sungilt's transmitter site, which is 8,500 feet above sea level, is subject to snowcover, ice and heavy winds from October or November until March or April every winter. In fact, it is because Sungilt's last construction permit modification was granted in October, 1996, and expired in April, 1997, a period during which Sungilt's site was completely inaccessible for construction due to snow, ice and heavy winds, that Sungilt now has a Petition for Reconsideration pending.

The "acts of God" which precluded Sungilt from completing construction were, in many

ways, more disabling than the "acts of God" cited in the Report and Order. For example, a tornado may last only minutes and may permit resumption of construction or repair within a few days. On the other hand, at 8,500 feet above sea level, snow and ice can, and did, preclude construction for a six month period. Therefore, Sungilt requests that the Commission clarify its description of "acts of God" to include snow, ice, extended periods of heavy wind and extremely cold temperatures which make construction virtually impossible, as events that will toll the three year construction permit period set forth in the new Section 73.3598 of the Commission's Rules.

B. The Commission Should Clarify Whether Section 73.3598(b)(i) Requires a Permittee That Has Acted with Due Diligence to Obtain All Local, State and Federal Regulatory Approvals Necessary to Construct a Commission Authorized Facility to Sue a Regulatory Body That the Permittee Believes May Preclude the Permittee from Constructing its Authorized Facility Within Three Years.

Proposed Section 73.3598(b)(ii) of the Commission's Rules provides, in pertinent part, that the three year limit for a construction permit can be tolled if "...construction is delayed by any cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station, including any zoning or environmental requirement." This section of the Rule appears to presuppose that a permittee will only be unreasonably delayed by a regulatory body if the regulatory body has denied the permittee's zoning or environmental request, thus requiring the permittee to sue the regulatory agency in order to obtain the regulatory body's required consent. However, the most frequent problem facing permittees is not a regulatory body's unreasonable refusal to approve the permittee's proposed facilities, but rather by the delay of the regulatory body to take any action. Inaction, rather than negative action, is likely to be the primary cause precluding permittees from constructing their

facilities within the three year time period mandated by proposed Section 73.3498 of the Commission's Rules. As the Commission is well aware, this situation is especially true today with the exponential proliferation of antenna towers as a result of both the rapid expansion of wireless services and the advent of digital television. Many zoning authorities are now taking much longer to approve all tower construction applications.

Against this backdrop, the apparent requirement contained in proposed Section 73.3598(b)(ii), that in order to toll this section's three year construction permit limit, a permittee must actually sue a regulatory body that a permittee fears may preclude it from completing construction of its facilities within three years is untenable. If a zoning authority or other regulatory body has not acted, under the Commission's new rule, a prudent permittee would need to file a writ of mandamus, or some similar action to meet the Commission's tolling requirement for pending litigation. However, it is very difficult to be successful in a mandamus action, particularly if it must be filed in state court, rather than federal court. In addition, even if a permittee is successful, a mandamus order merely requires a regulatory body to act, it rarely requires a particular outcome. Thus, a permittee which has successfully litigated a mandamus action must then seek approval from a regulatory body which has been ordered to act by a court. The ultimate action taken under such conditions may not be favorable to the permittee.

Therefore, a litigation requirement would virtually preclude a permittee from cooperating with the regulatory body in the first place, and would also unnecessarily deplete precious permittee resources by requiring a permittee to turn to the courts at the first sign of regulatory delay. Clearly, rather than serving the Commission's goal of rapid completion of construction of authorized facilities, the litigation requirement contained in proposed Section 73.3598(b)(ii) may cause

extensive, needless delay by requiring the litigation of regulatory delays that could otherwise be resolved amicably on a more expedient basis. Accordingly, the Commission should clarify the litigation requirement contained in proposed Section 73.3598(b)(ii) by amending it to state that, if a permittee can show that it has acted with due diligence to obtain the requisite regulatory approval, it is not required to commence litigation against a regulatory body in order to toll the three year construction permit limit.

CONCLUSION

The Commission should reconsider and clarify the restrictions and prohibitions contained in the new Section 73.3598 and clarify that: (i) Section 73.3598, as amended, does not apply retroactively to applications for extensions of permits and Petitions for Reconsideration of extension denials that have been filed prior to the effective date of Section 73.3598, (ii) conditions such as the snowcover and ice encountered by Sungilt are "acts of God" that toll the construction permit period, and (iii) that permittees that have acted with due diligence to obtain necessary federal, state and local regulatory approvals are not required to initiate litigation against regulatory bodies in order to toll the three year construction permit limit.

Respectfully submitted,

SUNGILT CORPORATION, INC.

By: 

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Washington, D.C. 20036

(202) 861-0870

Its Attorneys

Dated: January 19, 1999



United States of America
FEDERAL COMMUNICATIONS COMMISSION
TELEVISION BROADCAST STATION
CONSTRUCTION PERMIT

Official Mailing Address:

SUNGILT CORPORATION, INC.
2309 N. HAMPTON
TUCSON, AZ 85719

Authorizing Official
Ray C. Pendarvis
Chief, TV Branch
Video Services Division
Mass Media Bureau

Grant Date: OCT 25 1996

Call Sign: KXGR

This permit expires 3:00 a.m.
local time, 6 months after
grant date specified above.

Permit File No.: BMPCT-960801LM

This Permit Modifies Permit No.: 951030KI

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

This permit shall be automatically forfeited if the station is not ready for operation within the time specified (date of expiration) or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under the control of the permittee. See Sections 73.3598, 73.3599 and 73.3534 of the Commission's Rules.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of Permittee:

SUNGILT CORPORATION, INC.

Station Location:

AZ-GREEN VALLEY

Frequency (MHz): 662.0 - 668.0

Carrier Frequency (MHz): 663.25 Visual 667.75 Aural

Channel: 46

Hours of Operation: Unlimited

Transmitter location (address or description):

PRIME COMMUNICATIONS SITE, MT. BIGELOW, PIMA COUNTY, AZ

Transmitter: Type Accepted. See Sections 73.1660, 73.1665 and 73.1670 of the Commission's Rules.

Antenna type: (directional or non-directional): Non-Directional

Description: ANDREW ATW25H6-E501-46M

Beam Tilt: 1.50 Degrees Electrical

Major lobe directions (degrees true): Not applicable

Antenna Coordinates: North Latitude :	32	24	54
West Longitude :	110	42	56

Transmitter output power.....: As required to achieve authorized ERP

Maximum effective radiated power (PEAK): 1860.0 kW
: 32.7 DBK

Height of radiation center above ground.....: 53 Meters

Height of radiation center above mean sea level.: 2642 Meters

Height of radiation center above average terrain: 1095 Meters

Antenna structure registration number: none

Overall height of antenna structure above ground
(including obstruction lighting if any).....: 73 Meters

Obstruction marking and lighting specifications for antenna structure:

It is to be expressly understood that the issuance of these specifications is in no way to be considered as precluding additional or modified marking or lighting as may hereafter be required under the provisions of Section 303(q) of the Communications Act of 1934, as amended.

PARAGRAPH 01.0, FCC FORM 715 (OCTOBER 1985):

Antenna structures shall be painted throughout their height with alternate bands of aviation surface orange and white, terminating with aviation surface orange bands at both top and bottom. The width of the bands shall be equal and approximately one-seventh the height of the structure, provided however, that the bands shall not be more than 100

feet nor less than 1 and 1/2 feet in width. All towers shall be cleaned and repainted as often as necessary to maintain good visibility.

PARAGRAPH 03.0, FCC FORM 715 (APRIL 1985):

There shall be installed at the top of the structure one 300 m/m electric code beacon equipped with two 620- or 700-watt lamps (PS-40, Code Beacon type), both lamps to burn simultaneously, and equipped with aviation red color filters. Where a rod or other construction of not more than 20 feet in height and incapable of supporting this beacon is mounted on top of the structure and it is determined that this additional construction does not permit unobstructed visibility of the code beacon from aircraft at any normal angle of approach, there shall be installed two such beacons positioned so as to insure unobstructed visibility of at least one of the beacons from aircraft at any normal angle of approach. The beacons shall be equipped with a flashing mechanism producing not more than 40 flashes per minute nor less than 12 flashes per minute with a period of darkness equal to approximately one-half of the luminous period.

PARAGRAPH 11.0, FCC FORM 715 (APRIL 1985):

At the approximate mid point of the over-all height of the tower there shall be installed at least two 116- or 125-watt lamps (A21/TS) enclosed in aviation red obstruction light globes. Each light shall be mounted so as to insure unobstructed visibility of at least one light at each level from aircraft at any normal angle of approach.

PARAGRAPH 21.0, FCC FORM 715 (APRIL 1985):

All lighting shall burn continuously or shall be controlled by a light sensitive device adjusted so that the lights will be turned on at a north sky light intensity level of about 35 foot candles and turned off at a north sky light intensity level of about 58 foot candles.

PARAGRAPH 22.0, FCC FORM 715 (APRIL 1985):

During construction of an antenna structure, for which obstruction lighting is required, at least two 116- or 125-watt lamps (A21/TS) enclosed in aviation red obstruction light globes, shall be installed at the uppermost point of the structure. In addition, as the height of the structure exceeds each level at which permanent obstruction lights will be required, two similar lights shall be displayed nightly from sunset to sunrise until the permanent obstruction lights have been installed and placed in operation, and shall be positioned so as to insure unobstructed visibility of at least one of the lights at any normal angle of approach. In lieu of the above temporary warning lights, the permanent obstruction lighting fixtures may be installed and operated at each required level as each such level is exceeded in height during construction.

Special operating conditions or restrictions:

1. Grant of this authorization is conditioned on the outcome of the digital television (DTV) rule making proceeding in MM Docket No. 87-268. To the extent that the station's Grade B contour or potential for causing interference is extended into new areas by this authorization, the Commission may require the facilities authorized herein to be reduced or modified.

*** END OF AUTHORIZATION ***

FOR
FCC
USE
ONLY

FCC/MELLON APR 24 1997

FCC 307

APPLICATION FOR EXTENSION OF BROADCAST
CONSTRUCTION PERMIT OR TO REPLACE EXPIRED
CONSTRUCTION PERMIT :

(CAREFULLY READ INSTRUCTIONS BEFORE FILLING OUT THIS FORM)

FOR COMMISSION USE ONLY

FILE NO. BM PCT-970424 KF

1. APPLICANT NAME (Last, First, Middle Initial)

SUNGILT CORPORATION INC.

MAILING ADDRESS (Line 1) (Maximum 35 characters)

2309 N Hampton Street

MAILING ADDRESS (Line 2) (Maximum 35 characters)

City
Tucson

STATE OR COUNTRY (if foreign address)
AZ

ZIP CODE
85719

TELEPHONE NUMBER (include area code)

520 628-9595

CALL LETTERS OR OTHER FCC IDENTIFIER (IF APPLICABLE)

2. A. Is a fee submitted with this application?

☒ Yes ☐ No

B. If No, indicate reason for fee exemption (see 47 C.F.R. Section 1.1112).

☐

Governmental Entity

☐

Noncommercial educational
licensee/permittee

☐

Other (Please explain):

C. If Yes, provide the following information:

Enter in Column (A) the correct Fee Type Code for the service you are applying for. Fee Type Codes may be found in the "Mass Media Services Fee Filing Guide." Column (B) lists the Fee Multiple applicable for this application. Enter in Column (C) the result obtained from multiplying the value of the Fee Type Code in Column (A) by the number listed in Column (B).

(A)

(B)

(C)

FEE TYPE CODE		
M	K	T

FEE MULTIPLE (if required)			
0	0	0	1

FEE DUE FOR FEE TYPE CODE IN COLUMN (A)
\$ 245.00

FOR FCC USE ONLY
245.00

3. PURPOSE OF APPLICATION: ☒ a. Additional time to construct broadcast station

☐

b. Construction permit to replace expired permit

4. IDENTIFICATION OF OUTSTANDING CONSTRUCTION PERMIT

Legal name of Applicant

Sungilt Corporation Inc.

File Number 951030KI

Call Letters

BPCT830311KN

KXGR-TV

☒

Main Transmitter

☐

Auxiliary Transmitter

Frequency

662-668

Channel No.

- 46 -

City

Green Valley

State

AZ

5. Submit as an Exhibit a list of the file numbers of pending applications concerning the station, e.g., major or minor modifications, assignments, etc.

Exhibit No.

6. EXTENT OF CONSTRUCTION

a. Has equipment been delivered?

☒ Yes ☐ No

If No, submit as an Exhibit a description of what equipment has been ordered, from whom and when it was ordered, and the promised delivery date (if any). If no order has been placed, so indicate and explain.

Exhibit No.
A

b. Has installation commenced?

☒ Yes ☐ No

If Yes, submit as an Exhibit a description of the extent of installation, the date on which installation commenced, and the estimated date by which construction can be completed.

Exhibit No.
B

7.(a) If application is for extension of construction permit, submit as an Exhibit any additional construction progress not specified above and reason(s) why construction has not been completed.

Exhibit No.
B

(b) If application is to replace an expired construction permit, submit as an Exhibit the reason for not submitting a timely extension application, together with any additional construction progress not specified above and the reason(s) why construction was not completed during the period specified in the construction permit or subsequent extension(s).

Exhibit No.

8. Are the representations, including environmental, contained in the application for construction permit still true and correct?

☒ Yes ☐ No

If No, give particulars in an Exhibit.

Exhibit No.

9. Since the filing of the applicant's last application, has an adverse finding been made or final action been taken by any court or administrative body with respect to the applicant or parties to the applicant in a civil or criminal proceeding, brought under the provisions of any law relating to the following: any felony; mass media-related antitrust or unfair competition; fraudulent statements to another governmental unit; or discrimination?

☐ Yes ☒ No

If the answer is Yes, submit as an Exhibit a full disclosure concerning the persons and matters involved, including an identification of the court or administrative body and the proceeding (by dates and file numbers), and the disposition of the litigation. Where the requisite information has been earlier disclosed in connection with another application or as required by 47 U.S.C. Section 1.65(c), the applicant need only provide: (i) an identification of that previous submission by reference to the file number in the case of an application, the call letters of the station regarding which the application or Section 1.65 information was filed, and the date of the filing; and (ii) the disposition of the previously reported matter.

Exhibit No.

The APPLICANT hereby waives any claim to the use of any particular frequency or of the electromagnetic spectrum as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934, as amended.)

The APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations and that all the exhibits are a material part hereof and are incorporated herein as set out in full in the application.

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503))

CERTIFICATION

1. By checking Yes, the applicant certifies, that, in the case of an individual applicant, he or she is not subject to a denial of federal benefits that includes FCC benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988, 21 U.S.C. Section 862, or, in the case of a non-individual applicant (e.g., corporation, partnership or other unincorporated association), no party to the application is subject to a denial of federal benefits that includes FCC benefits pursuant to that section. For the definition of a "party" for these purposes, see 47 C.F.R. Section 1.2002(b).

☒ Yes ☐ No

2. I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Name

SUNGILT CORPORATION INC.

Signature

Arlene Stevens

Title

President

Date

April 24, 1997

Question 6
Exhibit A

As-previously reported to the Commission, the applicant has arranged for the complete construction and installation of its offices-studios-master control, production facilities and studio-to-transmitter link. These facilities are now in place and operative. The applicant has an agreement with the licensee of KHRR-TV, Channel 40, Tucson, Arizona, to co-locate with KHRR-TV their respective offices, studio, master control and production facilities. The applicant will have dedicated offices and master control facilities. The applicant will share studio and production facilities. Additionally, the agreement provides that the two stations will also share existing employees. The applicant will, however, employ at least two dedicated employees. The facilities are located at 2919 East Broadway, Tucson, Arizona, telephone (520) 322-6888. The agreement has been in effect since the grant of the construction permit.

As to the transmission facility, the applicant has been unable to install the equipment due to weather conditions at the site which is located at 6000 feet above the valley floor. The construction permit was granted in October 1996 immediately before the start of the Winter season; and a winter snow accumulation precluded access to the antenna/transmitter site until mid-April 1997. The installation is expected to be completed within ninety days.

Arlene Stevens
Arlene Stevens

Sungilt Corporation Inc.
Form 301

677 Report +
Order - released
April 21, 1997,
on recon

Question 7 (a)
Exhibit B

In addition to the reasons shown in Exhibit A, the applicant seeks additional time to construct because of the advent of digital television. Given that the Commission has now completed its first rulemaking for DTV, including adopting transmission standards and assigning digital channel allocations, the applicant believes that it can significantly hastened by a number of years the introduction of high definition television within the Tucson television market by building a combined NTSC and digital transmission plant. Thus, the applicant proposes to install a combined NTSC/digital transmitter and a broadband antenna capable of transmitting applicant's NTSC Channel 46 and its digital channel 47, which was just assigned three days ago. This objective would greatly serve the interests of viewers in the Tucson area. However, the currently authorized NTSC facilities are somewhat incompatible with the digital facilities. Thus, applicant is filing contemporaneously herewith, an application for a minor change to modify its existing construction permit so that its NTSC [Channel 46 and digital Channel 47] transmission plant can be compliant. And, pending Commission action on the modification permit, applicant also is contemporaneously filing with the Commission a request for special temporary authority to permit the commencement of broadcasting on Channel 46 using existing, installed and authorized facilities of K43CW.

Arlene Stevens
Arlene Stevens

FCC MAIL SECTION

Nov 28 10 53 AM '97 NOV 28 1997

*Agree 7-2
cf. J. L. L.*

1800E1-SA

DISPATCH
Sungilt Corporation, Inc.
2309 N. Hampton
Tucson, AZ 85719

Re: KXGR(TV)
Green Valley, AZ
BMPCT-970424KF

Dear Permittee:

This is with respect to the above-captioned application for an extension of time within which to construct Station KXGR(TV), Channel 46, Green Valley, Arizona.

The Commission's records show that your original construction permit was issued on July 20, 1990, and you initially had until July 20, 1992, in which to complete construction. On October 13, 1992, we granted your first extension of time to build the station based on your statement that you had entered into an agreement with Station KHRR-TV in Tucson, Arizona, for the provision of administrative, engineering services and studio/origination equipment. You further indicated that you had entered into an agreement for the acquisition of transmission equipment.

In your next extension application, filed on April 13, 1993, you stated that the delay in construction was due to the fact that the transmitter site representative made "unreasonable demands" for site rental fees. However, because you represented that the problem had been resolved, the Commission nevertheless granted you a six-month extension of your permit. However, we advised you then by letter dated June 17, 1993 that we did not expect to consider favorably another extension application without a specific and detailed showing that construction had commenced and that there had been substantial progress toward the completion of the station.

Since that time, despite the grant of two extension of time requests and two site change applications, you have failed to complete construction. You have filed the instant extension request stating that additional time is needed to complete construction due to the poor weather conditions and because you wish to build a combined NTSC/digital station. To that end, you state that you have contemporaneously filed a minor modification to your construction permit to make it compatible with your digital channel. You further state that you have requested Special Temporary Authority to commence broadcasting using the existing facilities of translator station K43CW.

Before an extension application can be granted, Section 73.3535(b) of the Commission's Rules requires a showing that either substantial progress has been made in the construction of the station or that reasons clearly beyond the permittee's control prevented construction, and that all possible steps have been taken to resolve the problem and proceed with construction.

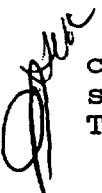

Although you have now held the permit for seven years, only minimal construction, if any, has taken place. Your first extension request in 1992 stated that you had an agreement with the licensee of Station KHRR-TV, Channel 40 Tucson, Arizona to co-locate with that station's offices, studio, master control and production facilities. In the instant application, you cite this same agreement as evidence of substantial progress. However, the Commission's rule requires that substantial progress is demonstrated with each extension application. Therefore, it cannot be concluded that you have made substantial progress.

In addition, you now attribute delay to your new site, which you state could not be constructed on due to poor weather conditions. However, this site was approved October, 1996 and the instant extension filed in April, 1997. This time period of six months should have been ample enough time to at least commence constructing the station even with some days of inclement weather. Also, although you state that you have requested a Special Temporary Authority to commence broadcasting on translator station K43CW and have filed a minor modification to accommodate your digital channel, the Commission is not in receipt of these requests. In any event, it is not clear how the use of a translator station's facilities would qualify as substantial progress in the construction of your full-service television station. Finally, although the Commission has approved the implementation of digital television, the primary responsibility of the permittee is to complete construction on its analog television station. In sum, you have not shown in the instant extension request a specific and detailed showing that construction has commenced and that there has been substantial progress since your last extension.

Accordingly, for the reasons stated, your extension application IS DENIED, and your construction permit IS CANCELLED, and your call sign IS DELETED.

Sincerely,

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

 cc: Stephen T. Yelverton, Esq.
sva/MMB"kxgr"
Typed: 11-14-97


SUNGILT INC

KXGR-TV 46

Arlene Stevens

RECEIVED

DEC 29 1997

December 26, 1997

Federal Communications Commission
Office of Secretary

The Secretary
Federal Communications Commission
1919 M Street Room 222
Washington, D.C. 20554

Re: KXGR(TV)
Green Valley, AZ
BMPCT-970424KF

Dear Mr. Secretary:

Sungilt Corporation Inc., pursuant to Section 1.106(a)(1) of the Commission's Rules, hereby tenders for filing the attached original and four copies of a "Petition for Reconsideration" of the letter action dated November 28, 1997, by the Chief, Video Services Division, denying the referenced application for extension of time to construct, canceling the construction permit and deleting the call sign.

If there are any questions, please advise.

Sincerely,

Sungilt Corporation Inc.

By: Arlene Stevens
Arlene Stevens
Its President

COPY SENT REF ROOM

COPY SENT REF ROOM

2309 NORTH HAMPTON STREET TUCSON, ARIZONA 85719

Original

RECEIVED

DEC 29 1997

Federal Communications Commission
Office of Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re

SUNGILT CORPORATION INC.

Construction Permittee of
KXGR(TV)
Green Valley, Arizona

Application For Extension
of Time To Construct

BMPCT--970424KF

To: Chief, Video Services Division

PETITION FOR RECONSIDERATION

I. Summary

A. Introductory Statement

The antenna site for KXGR(TV) is located atop Mt. Bigelow. The mountain site is at an Alpine-type elevation of 8500 feet. Typical Winters are harsh. Weather conditions include snow, ice, temperatures between 10 to 20 degrees and hurricane force winds from 80 mph to 100 mph. Area roads are typically closed.

Unseasonably early, heavy and continuing Winter snowfalls, freezing temperatures, residual ice, hurricane force winds and other harsh weather conditions, or threats thereof, precluded any construction of Station KXGR(TV) from October 26, 1996, through April 1997. Weather conditions were so severe that the U.S. Forest Service closed, locked and gated the access road to the antenna site to all but emergency vehicles for virtually the entire construction permit time period.

The Bureau's action in denying an extension of time was predicated on the incorrect factual assumption that weather conditions precluded construction for only "some days" during the Winter. The reality is that construction was precluded for virtually all days. Thus, the permittee files for reconsideration.

Since (a) the weather factors were beyond the permittee's control and (b) all other remaining possible construction steps - site acquisition and installer contracting - were completed, the permittee maintains that it has complied with the applicable rules and is therefore entitled to an extension of time to construct.

B. Documentary Support

Documentary support for Sungilt's position is contained in Weather Bureau records and various statements from knowledgeable individuals and officials, detailing as follows:

- for the general and historic weather conditions at the antenna site, a meteorologist, at Exhibit 1;
- for specific weather during the construction permit period, Weather Bureau data, at Exhibit 2;
- for additional specific weather conditions at the antenna site, the site lessee, at Exhibit 3;
- for lack of access to the antenna site, Exhibit 4;
- for closure of the only approach road connected to the site access road, Exhibit 5;
- for site acquisition, a copy of the lease, at Exhibit 6; and
- for installer contracting, a copy of the letter rejecting Sungilt's contract because of adverse weather, at Exhibit 8.

Corroborative support for Sungilt's position is provided by information from the water utility company on-site representative, wind data from the University of Arizona, Department of Physics and Atmospheric Sciences, other service providers and newspaper articles, at Exhibits 9, 14, 11 and 12, respectively.

II. Request for Reconsideration

Sungilt Corporation Inc., construction permittee of KXGR(TV), Green Valley, Arizona (Sungilt), by its President, pursuant to Section 1.106(a)(1) of the Commission's Rules, hereby petitions the Chief, Video Services Division, Mass Media Bureau, to re-consider the action of November 28, 1997, denying the referenced application for extension of time to construct Station KXGR(TV), canceling the construction permit and deleting the call sign (Letter Action).

As shown below, the justification detailed in the extension application has been misinterpreted, a critical factor overlooked and an incorrect criteria used in denying the application.

III. The Letter Action

The Letter Action noted the history of the construction permit, including modification requests and extension requests, noting specifically the permittee's agreement with the licensee of KHRR-TV, Channel 40, Tucson to co-locate with that station's offices and use that station's existing and in-place master control facilities and production facilities. But, in evaluating the instant extension application, two critical factually incorrect conclusions were made:

- (1) that since the 1992 agreement to co-locate with KHRR-TV was prior to the relevant time period, it could not support the instant extension request (Co-location Rationale); and
- (2) that despite poor weather conditions at the transmission site, during the six months construction period, there were "...some days..." when construction could have occurred (Weather Rationale) (emphasis added).

The Letter Action also rejected as a basis for an extension, the permittee's position that delay was associated with the intent to build a digital television compatible facility.

IV. Basis For Reconsideration

A. Legal Basis

Sungilt argues that the Co-location Rationale and the Weather Rationale are based on factual misinterpretations of the extension application. Further, Sungilt maintains that the Bureau has applied improperly Section 73.3534(b) by applying the two applicable provisions in the conjunctive, rather than the disjunctive.

Sungilt also maintains that the proceeding concerning "Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service," MM Docket No. 276, despite not being specifically sanctioned by the rules, presenting an opportunity in the 78th television market to initiate digital service immediately and concurrently with the NTSC service, is an overriding policy justification.

B. Factual Basis

Contrary to the pivotal assumption in the Letter Action, access to the remote, mountaintop antenna site during and throughout the construction permit period from October 26, 1996 to April 24, 1997, was precluded by early and severe weather, or threats of the same. Snow, ice and hurricane force winds were so very dangerous that on October 26, 1996 [the day following grant of the construction permit], the U.S. Forest Service closed, gated and locked access to the antenna site for virtually the duration of the Winter to all but emergency vehicles [Exhibits 3, 4, 9 (Par. 8)].

V. Support For Reconsideration

A. Statement of Arlene Stevens

Arlene Stevens is President of the construction permittee. Attached as Exhibit 7 is her declaration [Stevens Declaration]. The Stevens Declaration inter alia (a) clarifies the meaning of Exhibit 1 of the extension application (b) states that in August 1996, Sungilt formally acquired rights to its antenna site by converting its site availability understanding into a definite lease and (c) documents that Sungilt in October 1996 and December 1996 arranged for the installation of its transmission facility by December 1, 1996.

Finally, Exhibit 7 explains that there are two separate roads leading to the site. The first begins on the valley floor at the city limits of Tucson at Milepost 1 and climbs to the summit of the Catalina Mountains. It is alternately named, Catalina Highway, Gen. Hitchcock Rd. and Mt. Lemmon Highway. [Approach Rd.]

The access road to the Mt. Bigelow transmitter site intersects Approach Rd. at Milepost 20 [Access Rd]. The Access Rd. is a narrow, non-maintained dirt road, 2.2 miles in length leading to the antenna tower and transmitter building. It is outsloped (higher in the center than on the sides) with an grade of 7-8 degrees. Because of the outslope, when the road is covered with ice, vehicles can slide off it. [Exhibit 7 (Par. 3), Exh. 9.]

B. The Co-location Rationale

In its 1992 application, the permittee advised the Bureau that it had expeditiously completed part construction. By arranging for the immediate availability of its offices, studio/production facilities and studio/transmitter links by co-locating with Station KHRR-TV, Sungilt demonstrated that expedition. Sungilt re-stated that construction progress in its instant application. In reviewing the application [Letter Action, page 2, paragraph 1], the Bureau stated -

"In the instant application, you cite this same agreement [with KHRR-TV] as evidence of substantial progress."

However, this is incorrect. Sungilt did not seek additional credit for the prior construction. In re-stating that progress, Sungilt sought only to clarify its continuing status and to demonstrate, consistent with Section 73.3534(b), that the permittee had completed all construction not associated with its antenna site which had been affected by adverse weather conditions.

C. The Weather Rationale

In its extension application [Exhibit A], Sungilt maintained that poor weather conditions (snow accumulation) at the Mt. Bigelow transmission facility site precluded access to the site during the construction permit time period. The Letter Action misinterprets and overlooks the exact wording of Exhibit A of the extension application. Exhibit A, paragraph 2, stated that "...snow accumulation precluded access to the antenna/transmitter site until mid-April 1997."

The Letter Action assumed that such weather conditions were only for "some days" during the six month construction permit period, thereby suggesting that (a) there were a limited number of weather-impaired days and (b) most or much of the time, the weather

"...should have [afforded] ample enough
time to commence constructing the station."
[Letter Action, page 2, paragraph 2.]

However, the opposite was true. For all days during the construction permit period, except brief periods in November 1996 and/or December 1996, weather conditions precluded access to the site. And during the excepted brief periods, the threat of adverse weather precluded construction. [Doty Moore Statement, Exhibit 16, Titan Towers Statement Ex 3, Sierra Pacific Statement, Ex 8].

1. Weather Preclusion

Submitted herewith as exhibits as a part of this petition for reconsideration, are the statements of, or concerning, (i) a meteorologist, Exhibit 1 (ii) a consulting engineer, Exhibit 15 (iii) three broadcast equipment construction installers, Exhibits

8, 11 and 16 (iv) a representative of Prime Communications Sites, the antenna site manager lessee, Exhibit 3 (v) the antenna site owner, the U. S. Forest Service, Exhibit 4 and (vi) the Pima County Arizona Sheriff's Department, Exhibit 5.

All of the declarants or information providers individually and/or collectively conclude that during the construction period from October 26, 1997 through April 1997, access to the site via the Access Rd. was precluded by wind, snow and residual ice and/or the threat thereof. Indeed, for virtually all of the period, the U.S. Forest Service had closed, gated and locked the Access Rd. And, during the same time period, the Sheriff's Department intermittently and without notice (i.e., responding to unpredictable weather conditions) had closed the Approach Rd. [Exhibit 3, 4, 5 and 7].

The early arrival and long duration of harsh weather conditions are reflected in the following monthly entries taken from the National Weather Service records [Exhibit 2]:

- * On October 26, 1996, the first snowfall, containing "...a record-breaking 2 feet..." fell on the antenna site on October 26, 1996. [Exhibit 12, first page; Exhibit 2, first page: 1.8" of melted snow];
- * On November 29, 1996, there was only .72" of snow, but that was accompanied by a 1 degree low temperature;
- * During December 1996, there was virtually no precipitation, yet residual ice forced the closing of the paved Approach Rd. at least twice, on December 18 and December 19;
- * January 1997 was exceptionally harsh. There were 58.5 inches of snow recorded. The lowest high was 21 degrees and the lowest low was nine degrees;

- * February 1997 had 46 inches of snow. Reflecting the weather's unpredictability, on one day [February 28], there were 30 inches of snow;
- * On March 1, 1997, there was a low temperature of 13 degrees. And, there were an additional 19 inches of snow. This was the continuation of one blizzard that lasted 40 hours, leaving an accumulated total of 56 inches of snow;
- * On March 31, there was only a "trace" of snow; but that trace caused the closure of Approach Rd.
- * On April 4, 1997, 1.23 inches of rain fell. This was accompanied by a freezing low temperature of 15 degrees and a high of only 33 degrees.

The last snowfalls were on April 17, 1997, and April 25, 1997.

[Exhibit 2, last page]. While the snowfall amounts were either small or traces, they were accompanied by sub-freezing temperatures [ice]. Those sub-freezing temperatures remained through April 27, 1997 [Exhibit 2, last page].

The above reflects that preclusive weather conditions began on the day after the construction permit was granted and ended on the day after the construction permit expired.

a. The Forest Service Statement

Steve Hensel is a Forest Technician with the U.S. Forest Service, stationed at Mt. Bigelow, the transmission site which is owned by the U.S. Forest Service and leased to Prime Communications Company. Hensel states that he personally is charged with responsibility as to the access road to the antenna site. He advises that the Forest Service closes Access Rd for safety reasons occasioned by heavy snow and ice. He also states that while they do not keep written records of closures, his recollection is that during the Winter of 1996, he closed Access Rd in late October.

1996, that it may have been re-opened briefly subsequently, but that the road was closed and locked again and remained closed through mid-April 1997 [Exhibit 4].

b. Sheriff's Department

Eric Johnson is a deputy sheriff for Pima County Arizona. He is stationed at the Mt. Lemmon substation which is adjacent to Mt. Bigelow. He states that snow and ice conditions during the winter season historically require intermittent extended closures of the Mt. Lemmon Highway which is the sole connection to the access road. Johnson personally makes closure decisions. Because road closures are not law violations, no records are kept of the closures. He recalls many extended closures of the highway last Winter. He recalls that the access road leading from the highway at Milepost 20 to the actual site is a narrow, non-maintained dirt road which was closed by the Forest Service to all traffic for most of last winter [Exhibit 5.].

c. Golden West Meteorology

Michael Pechner operates Golden West Meteorology, a weather consulting firm to the media, transportation and construction industries. He has examined data provided by the U.S. Weather Service, National Oceanic and Atmospheric Administration and the University of Arizona, Department of Physics and Atmospheric Sciences.

Generally, his analysis states that the antenna site is influenced by two storm tracks which produce harsh winter weather conditions from early November to mid-April with a tendency for

snowfalls of over 24" in a 24-hour period, temperatures frequently of 10 to 20 degrees and hurricane force winds of 80 to 100 mph. He states that throughout the Winter atop Mt. Bigelow, thick rime ice will cover steel structures such as antennas [Exhibit 1]. His analysis confirms the preclusive nature of the weather.

d. Consulting Engineer

Sungilt has had a consulting engineer examine the construction activity tasks required to complete installation of transmission facility. He has related the tasks to weather conditions at the site during the construction period.

The consulting engineer concludes that construction was impracticable during the construction permit period [Exhibit 15]; and that even had there been access to the site during the period, completing construction under the weather conditions detailed in the Weather Bureau data, would have been unsafe and virtually impossible. He further states that even if there were isolated days when part construction of some sub-systems could have been made under heroic conditions, the intervening snow and road closures, weather exposure and wind would have so damaged partially installed equipment that such equipment would have had to be replaced.[Exhibit 15].

e. International Towers Inc.

International Towers Inc. of Tucson, Arizona, has years of experience installing and maintaining broadcast transmission facilities. Their statement [Exhibit 11] notes that Mt. Bigelow is approximately 8,500 feet above sea level and is adjacent to the

southern most snow skiing resort in North America. They conclude that construction on Mt. Bigelow during the Winter of 1996 was next to impossible due to the severe weather [Exhibit 11].

f. Doty-Moore Tower Services Inc.

Doty-More Tower Service [including S & W Communications] is based in Tucson. They install broadcast transmission facilities. They state [Exhibit 16] that they have over 23 years of experience in tower and antenna construction. They reviewed the records of the U.S. Weather Bureau for Mt. Lemmon for the period between October 1996 to April 1997. They conclude that "the practical aspects of construction" during the Winter of 1996 had safety concerns and they would not have endorsed construction during this period. They note that conditions are unsafe when temperatures drop below 35 degrees. And, Sungilt notes that Weather Bureau data [Exhibit 2, first page] reflects that daytime and nighttime temperatures at the site first dropped below 35 degrees on October 28, 1996. Exhibit 7 contains photographs of snow accumulation on an undeterminable day during Winter 1996. They reflect that even a small amount of melted snowfall at the site's elevation can produce dangerous ice storm conditions.

g. Sierra Pacific Technology Inc.

For several years, Sierra Pacific Technology provided broadcast-engineering services to television broadcast stations. ~~Their statement [Exhibit 8] confirms the Stevens Declaration that in October 1996, the permittee specifically sought to engage their services to complete construction of the permittee's station.~~

However, Sierra Pacific flatly declined the engagement because of the expected adverse weather conditions at the site [Exhibit 8].

2. Falling Ice Days

Sungilt contends that adverse weather activity and road closures precluded construction during virtually all of the six month construction permit period. Nonetheless, Sungilt notes that during the construction permit time period, there were brief intermittent periods when there was no present precipitation and both Access Rd. and Approach Rd. may have been opened. And, concurrently there was sunshine and temperatures in the 50's. [See, e.g., Exhibit 3, "March 9 through March 15."]. However, since the weather was unpredictable [Exhibit 1 (page 2), 3, 4 (Par. 4), 7 (Par. 5), 9 and 16], conditions remained dangerous and unsafe [Exhibit 3, 5, 8 and 16]. Thus, construction was precluded during these intermittent periods.

One illustration of the danger is falling ice. The antenna site for Station KUAT-FM*, licensed to the University of Arizona, is also atop Mt. Bigelow. March 2, 1997, is a day shown in the Weather Bureau data [Exhibit 2] as having no active weather conditions and a temperature of 45 degrees. The above-freezing temperature and/or winds are believed by KUAT station management to have caused ice to fall from the tower onto the Station's transmission line, damaging the line and taking the Station off the air and requiring emergency repairs¹ [See, article, Arizona Star,

¹ Sungilt notes that despite the road closures, officials allow access for emergency repairs only [Exhibit 3]. Because such repairs typically do not involve heavy equipment and extended time

"Ice, Classical Music Don't Mix," March 4, 1997, at Exhibit 10]. Falling ice not only is capable of destroying transmission equipment, it is, of course, equally capable of inflicting serious injuries to construction workers.

C. Misperceptions

Sungilt is concerned that the Bureau may be influenced by the reputation of, and weather conditions in Tucson, the television market in which its city of license is located and which its transmitter site is near. Tucson has a national reputation for the most number of days per year of sunshine. And, Tucson Winters draw tens of thousands of visitors and seasonal residents annually for warmth and golf. However, Sungilt notes that the reputation is of the Tucson valley floor, not the Mt. Bigelow transmitter site.

More importantly, the antenna site is located in the Santa Catalina Mountains, atop Mt. Bigelow which is 8500 feet above sea level [Exhibit 11]. Snowfalls here allows adjacent Mt. Lemmon to claim title to being the southern most snow ski resort² in the United States [Exhibit 11]. By contrast, the City of Tucson is located at an elevation of 2,389 feet.

periods, the KUAT-FM repairs were completed in a single 24-hour day [Exhibit 10].

² As a clarifying matter, Sungilt notes that permanent residents of the Mt. Lemmon ski areas are not necessarily snow-bound during the entire Winter. Although paved Approach Road is often closed, these residents have intermittent access via snowmobiles, especially-equipped 4-wheel drive vehicles, etc. [Exhibit 12]. However, these residents although adjacent to, are outside the Mt. Bigelow antenna site access road which remained closed and locked throughout the Winter as detailed above.

For the convenience of the Bureau, Sungilt submits herewith as Exhibit 2, raw weather data [snow, temperature] as to the transmitter site. The snow and temperature data were secured by Arlene Stevens from the National Oceanic and Atmospheric Administration, 520 North Park Avenue, Tucson, on December 11, 1997. The agency supervises a remote weather monitoring station at Mt. Lemmon.³

Sungilt also submits as Exhibit 14, wind data for sample days for each Winter month for Mt. Bigelow during the construction permit period. The wind data was obtained by Arlene Stevens from the Department of Physics & Atmospheric Sciences, University of Arizona, Tucson on December 11, 1997. The University operates a wind station at Mt. Bigelow. The data reflects typical winds in excess of 25 mph, a speed considered unsafe for construction [Exhibit 16, See also, Exhibit 1].

VII. Application of Section 73.3534(b)

The Letter Action appears to hold that in order to secure an extension, Sungilt must show both substantial construction and preclusive factors beyond the permittee's control. However, Section 73.3534(b) allows an extension of time upon occurrence of either one of the following circumstances;

³ One of Sungilt's principal arguments is that on October 26 and October 27, 1996, heavy snowfalls at the site precluded access to the site. Yet, an examination of the raw weather data shows that on those dates, the monitoring station recorded only 1.8 and .25 inches of "Rain, melted." Sungilt is advised that the quoted expression means that the automated measuring station recorded melted snowfall into a canister-like tube. Unmelted snow measurements began in mid-December 1996.

- (a) construction is complete and testing is underway; or
- (b) substantial construction progress has been made; or
- (c) no progress has been made for reasons clearly beyond the control of the permittee and the permittee has taken all possible steps to proceed.

Sungilt maintains that while it need comply with only one circumstance, it has complied with two circumstances, as follows.

Substantial construction progress during the construction permit period is shown in a number of factors. In converting its letter of availability to a definite site lease [Exhibit 6], Sungilt satisfied the specific example cited in the rules of acquisition of a site as complying with the rule; and, in arranging during the permit period for the installation of its transmission facility with the site manager by December 1, 1996, [Exhibit 6, Section 1], Sungilt made additional progress. And, in offering to contract for engineering services of Sierra Pacific Technology to install the equipment [Exhibit 8], Sungilt made further progress. Collectively, these efforts constituted substantial progress.

Sungilt also maintains that it has demonstrated the third factor: uncontrollable preclusion. The cumulative statements as to the phenomenal winter and the resulting weather conditions all indicate clearly that the weather conditions effectively precluded access to the antenna site from late October through April 1997. Law enforcement and government officials actually closed, gated and locked the access road to the antenna site for all but a few days of the construction permit period. And, construction during those

few days would have put workers at a safety risk [Exhibit 3 and 16] and left the partially installed equipment vulnerable to the weather requiring later replacement [Exhibit 15]. Snow, ice and wind are factors beyond the permittee's control.

Further, with a site lease in hand [Exhibit 6], transmission equipment on hand [Exhibit A, Form 301], tower and transmitter building in place [Exhibit 6, page 1, Sections A and B], all possible other steps to proceed with construction were made and perfected during the construction permit period. And, with transmission equipment previously secured and studios and production facilities previously installed via the co-location agreement [Exhibit A to Extension Application], Sungilt had completed all construction steps, except those performable at the inaccessible transmitter site [Exhibit 7, Par. 9].

The assumption in the Letter Action that there were only "some days of inclement weather" significantly under-assumed reality. In fact, the opposite was true: there were only "some days" of accommodating weather; but, these isolated and intermittent days were not sufficient to permit safe construction [Exhs 3, 8 and 16].

Mr. Klebe states the situation in terms of technical capacities:

"As to the matter of winter construction on the mountain, this is next to impossible due to the severe weather at that altitude." [Exhibit 11]

Mr. Doty states it in safety terms:

"Tower and antenna construction techniques are very strict and unforgiving." "...extreme temperatures create...unsafe and potentially dangerous work condition[s]." [Exhibit 16]

Mr. Uyemura, citing adverse weather, puts it bluntly:

"Our firm declined the project." [Exhibit 8]

VIII. Digital Television Proceeding

In the application for extension of time [Exhibit B], Sungilt sought additional time to construct because of the advent of digital television (DTV). Sungilt noted that the Commission had recently adopted technical standards and assigned DTV channel allocations. Sungilt was assigned as a digital channel, Channel 47, pairing it with its NTSC channel, Channel 46. Since adjacent channel broadcasting is technically a very practical and straightforward technology, Sungilt sought additional time to initiate DTV in the Tucson market much sooner than required. Sungilt noted its intent to file an application to modify its facility to accommodate the digital components.

The Letter Action dismisses as a basis for an extension any delay occasioned by the permittee seeking to install a combined NTSC/digital antenna.⁴

⁴ The Letter Action also notes that the modification application has not been filed. In response, Sungilt notes that voluminous petitions for reconsideration of the digital allocation plans have been requested, including one by the Broadcasters Caucus that specifically seeks to change Sungilt's first adjacent allocation. And, Sungilt has been an active participant in that proceeding. See, "Reply Comments of KXGR(TV)," filed on or about January 22, 1997, wherein Sungilt has opposed efforts to assign Sungilt Channel 65 in lieu of Channel 46. Under the circumstances, it was reasonable for Sungilt to await final Commission action on requests for reconsideration of the channel allocation plan before seeking modification of its NTSC permit and/or filing for a digital construction permit for Channel 47.

Sungilt maintains that the Bureau has too hastily rejected the delay for the commencement of DTV in the Tucson market as an additional basis for an extension of time. Since the Commission is mandating all licensees and permittees to make the transition to DTV, the Commission's delay in resolving DTV issues is a factor beyond Sungilt's control; and, as such, it is within the ambit of Section 73.3534(b)(3) of the Rules. And, such mandate must include considerations of practical capacities and opportunities. As one of a handful of construction permittees with a first plus adjacent digital channel assignment, Sungilt is in a very unique position. Singularly or combined with the weather preclusion and other steps taken to complete construction, Sungilt maintains that the DTV delay is justified.

IIX. Conclusion

Having demonstrated that substantial progress was made during the construction permit period and that factors beyond its control [weather, road closures, the weather-driven refusal of contractors to perform] precluded it from additional construction, Sungilt has demonstrated that it has more than satisfied the requirements of the rule to justify grant of its extension application. Thus, Sungilt requests re-consideration, re-instatement of the construction permit, grant of the extension application and re-instatement of the call sign.

Respectfully submitted,
SUNGILT CORPORATION INC.

By: Arlene D. Stevens
Arlene D. Stevens
Its President

2309 North Hampton Street
Tucson, Arizona 85719

Dated: December 26, 1997

LIST OF EXHIBITS

Statement/Document	Exhibit Number
Golden West Meteorology	1
Weather Bureau Data	2
Prime Communications Company/ Titan Towers Inc.	3
Forest Service Representative	4
Sheriff's Department Representative	5
Antenna Site Lease	6
Arlene Stevens	7
Sierra Pacific Technology	8
Michael Stanley	9
Article, <u>Arizona Star</u> , March 4, 1997	10
International Towers Inc./ S&W Communications	11
Article, <u>Arizona Star</u> , October 27, 1996	12
[Intentionally left blank]	13
Mt. Bigelow Wind Data University of Arizona Department of Physics & Atmospheric Sciences	14
Consulting Engineer	15
Doty Moore Tower Services Inc.	16

EXHIBIT 1

Golden West Meteorology

914 Marietta Court, Cordelia (Fairfield), California 94595
Phone (707) 864-6799 Fax (707) 864-8125

MICHAEL PECHNER
Chief Meteorologist
High Sierra Office
P.O. Box 64
Norden, CA 95724
(916) 426-3171

December 22nd, 1997
Via fax and mail

SEAN BOYD
Meteorologist
KSEE TV Channel 24
5035 E. McKinley Ave.
Fresno, CA 93727
(209) 454-2459

KRIS HANSON
Meteorologist
Sacramento, CA
(916) 485-2042

ROGER CUNNINGHAM
Research Climatologist
Vallejo, CA
(707) 643-0205

STEVE PAULSEN
Meteorologist
KICU TV Channel 36
San Jose, CA
(408) 298-3636

Mrs. Arlene Stevens
Sungilt Corporation
2309 N. Hampton St.
Tucson, Az. 87519

Re: Weather for Mt. Bigelow, Arizona transmitter site.

Dear Ms. Stevens:

Mt. Bigelow near Tucson, Arizona lies at an elevation of 8500 ft. in Mogollon Mesa Rim, lying within the extreme southern end of the Rocky Mountains (formation). Despite its low latitude position, its almost 9000 ft. summit is high enough for this peak to have an Alpine climate. Its affected by two storm tracks. One of Maritime influence from the Pacific and another from a more Continental nature from storms sweeping southward out of Canada. Both can and do produce major winter storms which envelope this peak in harsh weather from early November to mid-April. Snow has been recorded on the mountain in every month of the year except July and August. The storms from the north tend to be colder and drier with light to moderate amounts of snow. However the weather systems from the Pacific tend to have heavier snows with a higher water content. Its not uncommon for snowfalls of over 24" in a 24 hr. period from December thru March. Low temperatures during the winter can drop below zero and are frequently in the 10 to 20 degree range with thick rime ice covering steel structures such as antennas atop these peaks. The other major weather factor accompanying these storms are the hurricane force winds.

Wind data supplied from a remote sensing station

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operated by the Physics and Atmospheric Sciences Department at the University of Arizona indicates that strong winds from both storms tracks can produce sustained winds of over 80 mph. Its estimated that peak gusts during some of the most severest storms can reach over 100 mph.

However, the frequency of storms varies from year to year and even from season to season. Snow depths can easily reach over six feet during the ski season from December to early April and infrequently have exceeded 9 feet. The Spring, Summer and Fall months offer an almost uninterrupted period of rather calm weather, only occasionally disrupted by thundershowers associated with Moonsoon conditions from old Mexico.

Sincerely,

Meteorologist Mike Pechner.

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